Filed 1/11/13 P. v. Borel CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TIANA NICOLE BOREL, Defendant and Appellant.	C066177 (Super. Ct. No. 09F08845)

A jury convicted defendant Tiana Nicole Borel of second degree robbery, false imprisonment, battery and second degree commercial burglary. The trial court sentenced her to seven years four months in prison.

Defendant now contends (1) her trial counsel rendered ineffective assistance; (2) the trial court erred in instructing the jury with CALCRIM No. 359 [corpus delicti -- independent evidence of a charged crime] because it relieved the prosecution of the

burden of proving the identity of the perpetrator; and (3) cumulative error resulted in prejudice.

We conclude (1) defendant has not established ineffective assistance of counsel; (2) the trial court did not err in giving CALCRIM No. 359, and the jury could not have understood the instructions as a whole to relieve the prosecution of its burden of proof; and (3) defendant's claim of cumulative prejudice lacks merit.

We will affirm the judgment.

BACKGROUND

Virginia Herrera and Marcus Alvarado were working one night at a Blockbuster Video store on Del Paso Road. The inside of the store was brightly-lit. Two robbers, one male and one female, ran into the store wearing ski masks. The robbers directed Herrera and Alvarado to get on the ground.

The male robber held what looked like a nine millimeter semi-automatic pistol in his hand. He ordered Herrera to open the cash registers. Herrera and Alvarado complied with the robber's order and sat down on the ground. The male robber took money from the cash registers.

While the male robber remained with Herrera and Alvarado, the female robber ran toward the back of the store where Stanley Hung and his wife Ting Hung were looking at movies to rent. According to Mrs. Hung, the female robber yelled something like "armed robbery. I have gun. Get to the floor." It appeared to the Hungs that the female robber held something like a gun or a weapon in her hand inside her jacket pocket. Because she was wearing a mask, only the eyes, eyebrows and top part of the nose of the female robber were visible.

The female robber forced Mrs. Hung to the floor, pressing Mrs. Hung's head down while yelling something like "This is armed robbery. I have gun . . . get down to the floor." The female robber then moved toward Mr. Hung, who slipped and hurt his leg. The female robber held Mr. Hung down and took his wallet containing $600.

Fearing that her husband had been killed, Mrs. Hung ran to check on him. But the female robber ran toward Mrs. Hung and yelled at Mrs. Hung to get down. It was then that Mrs. Hung noticed the female robber's distinctive gait. According to Mrs. Hung, the female robber walked in a "tiptoe" fashion, not touching her heels to the ground as she walked.

The female robber twisted Mrs. Hung's arm to turn Mrs. Hung around, pushed Mrs. Hung very hard to the ground, grabbed the back of Mrs. Hung's hair and pushed down. The female robber said something like, "I told you to -- this is armed robbery. Get down. Get down to the floor." Mrs. Hung was forced face down on the ground, causing injuries to her elbows and knees. The female robber pressed something that felt like a gun to Mrs. Hung's right temple.

The female robber then went to the cash registers and removed money from them. At that point Mrs. Hung hid under a curtained table and did not come out until Herrera pulled her out after the robbers left the store. The entire robbery occurred in one minute or less.

Ramandeep Singh was in his car about 50 feet away from the Blockbuster Video store at the time of the robbery. Lights were on in front of the store. Singh saw two people wearing masks and black clothing rush into the store. He then saw someone on the floor inside the store.

Singh called 911 and began to drive away. As he was leaving, he saw a gold Lexus parked in the middle of the street, blocking his path. Singh could not see if there was anyone in the Lexus. Five to seven seconds later, Singh saw the two masked individuals run into the Lexus. One got in the backseat of the car. Singh testified the driver of the Lexus was a heavy-set male.

Singh could not read the Lexus license plate number while they were at the Blockbuster Video store, but he remained on the phone with the 911 operator and followed the Lexus. The streets were lit and there was little traffic. Singh reported to the

911 operator that he was following a four door, gold colored 1990s Lexus LS. Singh, a mechanic, was confident about his identification of the year and make of the car. Singh also noticed that the Lexus had "flashy" rims.

Singh lost sight of the Lexus briefly at various points during the time he followed it, but with the exception of one pickup truck, there were no other cars on the street and Singh eventually ended up behind the Lexus. Singh was able to read the license plate number of the Lexus to the 911 operator.

Sumeet Kumar saw a gold colored Lexus pull into a Motel Six at high speed, stop for less than one minute out of Kumar's line of sight, then depart the area at a slow speed.

Police subsequently stopped the Lexus with the license plate number provided by Singh near the Florin Road exit of southbound Interstate 5. Defendant was in the driver's seat. Police did not find anything in the Lexus connecting defendant to the robbery.

Defendant is the registered owner of the vehicle Singh described. Singh subsequently identified defendant's Lexus as the car he observed and followed. Defendant testified her car had 18 inch chrome rims that were "pretty distinct[ive]."

Police took the Hungs to Florin Road for an in-field show-up.[1] Officer Nicholas Tavelli gave the following admonishment to the Hungs prior to the show-up: "You will be asked to view a person who has been contacted by the police. The person you are going to view may or may not be the subject you observed commit the crime. [¶] You are under no obligation to identify the person. If you identify the person as the subject you saw commit the crime, you will not be told if it is the person who -- who is suspected in committing the crime. [¶] Please keep an open mind while viewing the person and explain to the officer why or why not the person is suspect. Please do not

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[1] An in-field show-up involves showing a suspect to the witness for purposes of identification at the location where the suspect is being detained by law enforcement officers.

take into consideration if the person is handcuffed or removed from a police vehicle. Please do not discuss the in-field show up with any other people."

Defendant was taken out of a patrol car. She was handcuffed. A uniformed police officer walked her to the front of Officer Tavelli's patrol car, where Mr. and Mrs. Hung were seated. The overhead spotlight, side lights and front white lights of Officer Tavelli's patrol car were on and pointed forward. Bright lights illuminated the area. Mrs. Hung stepped out of the backseat of Officer Tavelli's patrol car and stood behind the front passenger-side door of Officer Tavelli's car. She saw defendant walk 10 to 15 steps toward her. Defendant stood about 26 feet from Mrs. Hung. Five to 10 seconds after defendant stopped walking, Mrs. Hung identified defendant as the female robber. Mrs. Hung recognized defendant's gait as that of the female robber. Mrs. Hung described defendant's gait as "kind of tiptoe." Mrs. Hung also identified defendant as the female robber based on her height, slender build and the top half of her face. Mr. Hung was unable to make a positive identification.

Even though Mrs. Hung told police officers that the female robber was a light-skinned African American and defendant is not light-skinned, Mrs. Hung testified at trial she was very confident she had correctly identified defendant as the female robber at the in-field show-up. At trial, Mrs. Hung again identified defendant as the female robber. Mrs. Hung testified she recognized defendant's eyes as those of the female robber's because of the "age of the eyes."

Defendant testified at trial that she was at her friend Kiana Thorp's home on the night in question. Defendant felt ill and planned to drive to her mother's house in South Sacramento. But she exited southbound Interstate 5 at Richards Boulevard because she was nauseous. She claimed she stopped long enough to open her car door and throw up, and got back on Interstate 5. Defendant denied stopping at the Motel Six off Richards Boulevard.

The jury found defendant guilty of the second degree robbery of Herrera (Pen. Code, § 211; count one),[2] the second degree robbery of Alvarado (§ 211; count two), the second degree robbery of Mr. Hung (§ 211; count three), the false imprisonment of Mrs. Hung (§ 236; count four), the misdemeanor battery of Mrs. Hung (§ 242; count five), and the second degree commercial burglary of Blockbuster Video (§ 459; count six). The jury also found true the allegation that defendant was armed with a firearm.

DISCUSSION

I

Defendant contends her trial counsel rendered ineffective assistance by (a) failing to object to the in-field show-up and subsequent in-court identification; (b) failing to present expert testimony to undermine Mrs. Hung's identification of defendant as one of the perpetrators; (c) failing to object when the prosecutor referred to the fact that defendant remained silent after she was advised of her rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*); and (d) failing to object when the prosecutor argued in closing that the jurors should put themselves in the position of the victims and should make the streets of Sacramento safer by convicting defendant.

To establish a claim of ineffective assistance of counsel, defendant must prove that (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant. (*People v. Maury* (2003) 30 Cal.4th 342, 389; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should

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[2] Undesignated statutory references are to the Penal Code.

be followed." (*Strickland v. Washington, supra,* 466 U.S. at p. 697 [80 L.Ed.2d at p. 699]; *In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

We review trial counsel's performance with deferential scrutiny, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and recognizing the many choices that attorneys make in handling cases and the danger of second-guessing an attorney's decisions. (*People v. Maury, supra,* 30 Cal.4th at p. 389; *Strickland v. Washington, supra,* 466 U.S. at p. 689 [80 L.Ed.2d at pp. 694-695].) "[Hence, t]actical errors are generally not deemed reversible, and counsel's decisionmaking . . . [is] evaluated in the context of the available facts. [Citation.]" (*People v. Maury, supra,* 30 Cal.4th at p. 389.) Moreover, counsel is not ineffective for failing to make a meritless objection or motion. (*People v. Weaver* (2001) 26 Cal.4th 876, 931; *People v. Memro* (1995) 11 Cal.4th 786, 834.) "To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.]" (*People v. Maury, supra,* 30 Cal.4th at p. 389; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268 [where appellate record sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance must be rejected]; *People v. Bess* (1984) 153 Cal.App.3d 1053, 1059 [" '[A]n appellate court's inability to understand why counsel acted as he [or she] did cannot be a basis for inferring that he [or she] was wrong' "]; *People v. Fosselman* (1983) 33 Cal.3d 572, 581 ["Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission"].)

Likewise, "prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Maury, supra,* 30 Cal.4th at p. 389.) Defendant must show a reasonable probability of a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218; *Strickland v. Washington, supra,* 466 U.S. at pp. 693-694 [80 L.Ed.2d at pp. 697-698].) It is not enough for defendant to show that errors had some conceivable effect on the outcome of the case. (*People v. Ledesma, supra,* 43 Cal.3d at p. 217.)

A

Defendant claims her trial counsel rendered ineffective assistance by failing to object to Mrs. Hung's identification of defendant as the female robber in the in-field show-up and later in court.[3] Defendant contends the one person show-up was unduly suggestive and unreliable, and that it tainted Mrs. Hung's in-court identification. Defendant asserts that this identification evidence resulted in such unfairness that it violated her right to due process of law.

To determine whether counsel was deficient for failing to object to the identification, defendant must first establish that the identification procedure the police used was unduly suggestive and unnecessary; and if so, that the identification by Mrs. Hung was unreliable under the totality of the circumstances, taking into account such factors as Mrs. Hung's opportunity to view the female robber at the time of the robbery, Mrs. Hung's degree of attention, the accuracy of her prior description of the female robber, the level of certainty Mrs. Hung demonstrated at the show-up, and the time between the robbery and the show-up. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) Our threshold task is to determine whether there was a substantial likelihood of irreparable misidentification under the totality of the circumstances to warrant reversal of

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[3] Although she did not object to the in-field identification, during her closing argument defendant's trial counsel highlighted various problems with Mrs. Hung's in-field and in-court identification.

the conviction. (*People v. Cunningham* (2001) 25 Cal.4th 926, 990 [citing *Manson v. Brathwaite* (1977) 432 U.S. 98 [53 L.Ed.2d 140]]; *People v. Medina* (1995) 11 Cal.4th 694, 753 [when determining whether the identification procedure was unduly suggestive, we must consider all of the surrounding circumstances].)

Defendant asserts that the one person show-up was unduly suggestive because Mrs. Hung saw defendant exit a police car in handcuffs and police asked Mrs. Hung if she could "see the person" who robbed her. But such show-up procedures have been approved by courts. (*Stovall v. Denno* (1967) 388 U.S. 293, 294, 296 [18 L.Ed.2d 1199, 1202-1203]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 378, 386; *In re Richard W.* (1979) 91 Cal.App.3d 960, 965-967, 969-970; *People v. Craig* (1978) 86 Cal.App.3d 905, 914; *People v. Anthony* (1970) 7 Cal.App.3d 751, 759, 764.) "[T]he mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification." (*In re Carlos M., supra*, 220 Cal.App.3d at p. p. 386.) In addition, Officer Tavelli's instructions were not unduly suggestive. (*Stovall v. Denno, supra,* 388 U.S. at pp. 294, 296 [18 L.Ed.2d at pp. 1202-1203].) Mr. Hung received the same instructions as Mrs. Hung during the in-field show-up and did not identify defendant. The Hungs were told that the person they were about to view may or may not be one of the perpetrators, they were under no obligation to identify the person, they would not be told if the person was suspected of committing the crime, they should not take into consideration the fact that the person was handcuffed or removed from a police vehicle, and they should keep an open mind while viewing the person. There is nothing in the record to indicate that the police encouraged Mrs. Hung to identify defendant as the female robber.

Although a one person show-up may pose a danger of suggestiveness, it is not inherently unfair. (*People v. Medina, supra,* 11 Cal.4th at p. 753; *People v. Ochoa, supra,* 19 Cal.4th at p. 413; *Stovall v. Denno, supra,* 388 U.S. at p. 302 [18 L.Ed.2d at p. 1206].) "To the contrary, single-person show-ups for purposes of in-field

identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.]" (*In re Carlos M., supra,* 220 Cal.App.at p. 387, italics omitted.)

Defendant also complains that the use of bright lights at the show-up rendered the identification impermissibly suggestive because the lights "impeded Mrs. Hung's vision" and made defendant's skin color look lighter. Mrs. Hung testified that police used bright lights to illuminate the area during the in-field identification. Mrs. Hung initially said that because of the bright lights, she "couldn't see anything." But Mrs. Hung then said she saw the path defendant took during the show-up. She observed how defendant walked and saw defendant's figure, height and eyes. There is no indication that the bright lights prevented Mrs. Hung from seeing defendant after defendant exited the patrol car. As for the effect of the bright lights on defendant's appearance, Mrs. Hung testified that People's exhibit No. 16 accurately depicted how defendant looked at the show-up. People's exhibit No. 16 is in the appellate record and does not show a lightening effect on defendant's skin color by bright lights.

Defendant further claims that Mrs. Hung's identification of defendant at the in-field show-up was unreliable because Mrs. Hung did not have adequate opportunity to observe the female robber, her observation was made under extremely stressful conditions, and Mrs. Hung's description of the female robber did not match defendant's appearance during the show-up. However, the inside of the Blockbuster Video store was well-lit. Mrs. Hung observed how the female robber walked and saw her height, build and eyes. Mrs. Hung identified defendant immediately at the show-up upon seeing defendant's distinctive "tiptoe" gait. Mrs. Hung also identified defendant based on her height, slender build and eyes. Although Mrs. Hung's description of the female robber's

skin color did not match defendant's skin color, Mrs. Hung relied on other characteristics to identify defendant, and Mrs. Hung testified she was very confident that she had correctly identified defendant as the female robber. Finally, the show-up occurred within two hours after the robbery, when Mrs. Hung's memory of the events would have been fresh. (*People v. Cowger* (1988) 202 Cal.App.3d 1066, 1071-1072 [prompt identification will be more accurate than a belated identification].)

There was no substantial likelihood of misidentification because in addition to Mrs. Hung's positive identification, Singh identified defendant's gold colored Lexus with "flashy" rims as the car he saw the robbers use. Singh followed the Lexus, officers saw it, too, and defendant was behind the wheel of the Lexus when police stopped the car.

The prosecutor argued to the jury that the robbers had an opportunity to change their clothes and shoes, split up and remove evidence of the robbery from defendant's car. That argument is supported by Kumar's testimony that a gold colored Lexus pulled into the Motel Six, stopped briefly in a parking area, and departed the property. Police spotted defendant's car near that location and stopped the car shortly thereafter.

Defendant further claims that Mrs. Hung's in-field identification tainted her subsequent in-court identification, but as we have explained, the show-up was not unduly suggestive or unreliable. Mrs. Hung identified defendant as the female robber at trial and nothing in the record indicates that the in-court identification was not based on her observation of the female robber during the robbery. (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819 [claim of unfairness must be based on " 'demonstrable reality,' " not speculation].)

On this record, an objection to Mrs. Hung's identification would have been overruled, and hence defendant's ineffective assistance claim fails. (*People v. Weaver, supra,* 26 Cal.4th at p. 931 [trial counsel need not make meritless objection].)

B

Defendant next contends that her trial counsel rendered ineffective assistance by failing to present expert testimony to undermine Mrs. Hung's identification of defendant as one of the perpetrators.

Defendant claims an expert was needed to explain "weapon focus," in which the victim focuses more on the weapon than on the criminal's face. (See *People v. Arias* (2010) 182 Cal.App.4th 1009, 1015.) But there is no evidence that Mrs. Hung was so focused on a weapon that she did not notice the female robber's appearance.

Defendant also contends an expert was necessary to point out that cross-racial identifications are problematic. However, Mrs. Hung identified defendant as the female robber based, in large part, on defendant's "tiptoe" gait. Mrs. Hung also relied on defendant's height and slender figure. Defendant does not suggest that these features are susceptible to cross-racial identification problems.

Defendant further argues that a defense expert was necessary because the prosecutor described Mrs. Hung as a "quasi-expert" in identifying robbery suspects. But the prosecutor did no such thing. The prosecutor merely argued during closing argument that Mrs. Hung noticed details about the female robber because she was trained to notice details for job interviews. However, Mrs. Hung was not asked to offer an expert "opinion." She was asked, as a percipient witness, to tell the jury what she personally observed. (Evid. Code, § 801 [expert witness testifies in the form of an opinion about a matter within his or her expertise]; *People v. Valdez* (1986) 177 Cal.App.3d 680, 687 ["percipient" witness is one who testifies to observed facts in the controversy; expert witness is one who expresses opinions on the basis of hypothetical facts, personal knowledge of facts not in controversy, or testimony heard in court].)

In any event, the record sheds no light on why defendant's trial counsel did not call an expert witness, and this is fatal to defendant's claim. (*People v. Mendoza Tello, supra,* 15 Cal.4th at p. 266.) Defendant's trial counsel might have concluded that the

reliability of Mrs. Hung's identification could be sufficiently challenged in closing argument by reference to the evidence and to CALCRIM No. 315 [jury evaluation of eyewitness identification]. (*People v. Plasencia* (1985) 168 Cal.App.3d 546, 556 [cross-examination, argument and jury instructions can highlight the unreliability of eyewitness identifications]; *Jones v. Smith* (11th Cir. 1985) 772 F.2d 668, 674 [failure to present expert testimony about unreliability of eyewitness identification was not ineffective assistance of counsel where the likelihood of mistaken identification was brought to jury's attention through cross-examination]; *Brown v. Terhune* (N.D.Cal. 2001) 158 F.Supp.2d 1050, 1071 [rejecting ineffective assistance of counsel claim in part because of trial counsel's vigorous cross-examination and closing argument].) In fact, defendant's trial counsel underscored for the jury the difference between Mrs. Hung's description of the female robber's skin color and defendant's skin color; the stressful conditions under which Mrs. Hung observed the female robber; that Mrs. Hung observed the female robber for only a short time; and the circumstances of the in-field show-up. Trial counsel also questioned Mrs. Hung's in-court identification by suggesting that Mrs. Hung had seen defendant at the show-up and thus associated defendant with the robbery. Those arguments were made after the trial court instructed the jury with CALCRIM No. 315, directing the jurors that they should consider a number of factors to evaluate eyewitness testimony, including how long the witness observed the perpetrator, whether the witness was under stress when he or she made the observation, whether the witness's description of the perpetrator matched the defendant, whether the witness was asked to pick the perpetrator out of a group, and whether the witness and the defendant are of different races.

Defendant's ineffective assistance claim also fails because she has not established that expert testimony would have been favorable to her. (*People v. Datt* (2010) 185 Cal.App.4th 942, 952-953.)

Defendant relies on *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*), overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, at page 914, for the proposition that an expert might have countered a number of misconceptions about eyewitness identification. However, the California Supreme Court in *McDonald* did not state that expert testimony must be presented in every case involving eyewitness identification. Rather, the Supreme Court emphasized that such evidence would not often be needed and that the decision to admit or exclude such evidence remains primarily a matter within the trial court's discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 508-509; *McDonald, supra*, 37 Cal.3d at p. 377.)

The issue in *McDonald* was whether the trial court abused its discretion in excluding expert testimony proffered by the defense regarding the psychological factors that may affect the accuracy of eyewitness identification. (*McDonald, supra*, 37 Cal.3d at pp. 361-363, 375-376.) The Supreme Court held that "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*Id.* at p. 377.)

This case is distinguishable. Mrs. Hung's strong and unequivocal identification of defendant was significantly corroborated by Singh's testimony and other evidence giving it independent reliability.

C

Defendant further argues that her trial counsel rendered ineffective assistance by failing to object when the prosecutor referred to the fact that defendant remained silent after she was advised of her *Miranda* rights. (*Miranda, supra,* 384 U.S. 436 [16 L.Ed.2d 694].) Defendant argues her trial counsel should have objected when the prosecutor (i)

cross-examined defendant about why she did not inform officers of her alleged alibi while in jail, and (ii) later referenced defendant's failure to mention her alibi during closing argument. Defendant contends trial counsel's failure to object constituted ineffective assistance because in *Doyle v. Ohio* (1976) 426 U.S. 610, 611, 619 [49 L.Ed.2d 91, 94, 98] (*Doyle*), the United States Supreme Court held that a prosecutor violates the federal due process clause by using a defendant's post-arrest, post-*Miranda* silence to impeach his or her exculpatory story told for the first time at trial. Under *Doyle*, post-*Miranda* silence may not be used to imply guilt or to attack the defendant's credibility either by questioning or by reference in closing argument. (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1555; *People v. Evans* (1994) 25 Cal.App.4th 358, 368, 370.)

Defendant testified she was at her friend Kiana Thorp's apartment on the night of the robbery and she denied involvement in the robbery. During cross-examination, the prosecutor questioned defendant about her alibi as follows:

"Q. You've given Kiana's information to law enforcement?

"A. I've given Kiana's information to my public defender, yes.

"Q. Okay. Well, that's different. I'm asking if you've given Kiana's information to law enforcement?

"A. I have not spoken with law enforcement regarding this.

"[¶] . . . [¶]

"Q. And Detective Mortonson -- you remember when Detective Mortonson talked to you in the jail?

"A. Yes.

"[¶] . . . [¶]

"Q. It was a day or two after you had been arrested, right?

"A. I believe so. I'm not exactly sure of the date.

"Q. They spoke to you while you were still in custody, right?

"A. Yes.

"Q. And Detective Mort[o]nson was basically saying, Tell me where you were, right?

"A. Yes.

"Q. Because you're -- in your mind, you had been wrongfully arrested, right?

"A. Exactly.

"Q. Why didn't you tell Detective Mortonson you were with Kiana then?

"A. Because I wanted to speak with an attorney prior to speaking with the law enforcement.

"[¶] . . . [¶]

"Q. And you were sitting in jail accused of committing that horrific crime?

"A. Yeah.

"Q. You were not guilty.

"A. Exactly.

"Q. You had an airtight alibi?

"A. Exactly.

"Q. But you still didn't share that with law enforcement?

"A. Again, I wanted to speak with an attorney before I spoke with law enforcement because --

"Q. But you still didn't tell law enforcement?

"A. No, I did not."

After questioning defendant about her medical condition, the prosecutor asked:

"Q. But jail wouldn't be a comfortable situation for your illness? [¶] . . . [¶] And you still didn't kind of just blurt out, I was at Kiana's. This is where I was. Let me out?

"A. I didn't -- again, like I said, I wanted to speak with an attorney again and make sure what I was saying was okay. I didn't want to be railroaded by the police. And that's what it seemed like was happening to me on that night.

"Q. And you don't think -- what about telling the police that you've got the wrong person, I was at Kiana's? Would be railroading you?

"A. I told them that I was innocent."

During closing argument, the prosecutor again referenced defendant's failure to tell police her alibi. The prosecutor said: "And she talked to law enforcement. I asked her about it. She talked to law enforcement when she was in custody on December 3rd, 2009. This is Christmas time. You want to be with your family. You don't want to be in jail. If you have an airtight alibi, why would you stay in custody? I was with my sister, Kiana. Call her. Ask her. She'll tell you everything. She'd just rather sit there and not tell them? First time we hear about Kiana is when she takes the stand? [¶] Think about how reasonable that is in light of everything."

Defendant claims she clearly invoked her right to silence and to counsel when questioned by police in jail. But she testified that Detective Mortonson spoke to her while she was in jail, and the record is unclear whether defendant (i) refused to talk to Mortonson, or (ii) voluntarily spoke to him but omitted telling him that she was at Thorp's apartment on the evening of the robbery.[4]

In any event, even if we assume that the prosecutor committed *Doyle* error, we nonetheless cannot determine from the record why trial counsel did not object to the

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[4] The federal and California Supreme Courts have not decided whether *Doyle* applies to selective silence. (*People v. Bowman* (2011) 202 Cal.App.4th 353, 364.) The Second District Court of Appeal in *People v. Hurd* (1998) 62 Cal.App.4th 1084 answered this question in the negative. It held that *Doyle* does not apply where a defendant elected to speak with police after receiving a *Miranda* warning but refused to provide critical details. (*Hurd, supra*, 62 Cal.App.4th at pp. 1093-1094.) In *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 119, the California Supreme Court noted that some federal circuits have held that *Doyle* precludes the use of partial silence to the extent that the defendant relied on a *Miranda* warning in refusing to answer specific questions. (*Ibid.*) But the Supreme Court declined to determine whether a prosecutor violates *Doyle* by commenting on a defendant's selective silence, finding no prejudice instead. (*Ibid.*)

prosecutor's cross-examination questions and closing argument remarks. The record does not show that trial counsel was asked to explain her failure to object. Counsel's failure to object could have been based on reasonable tactical reasons. (*People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1521-1522 [finding defense counsel's failure to object to *Doyle* error reasonable where defense counsel explained he did not object because he did not want to call undue attention to the defendant's cross-examination answers and in order to dispel any speculation by the jury that the defendant had confessed].) " ' "The choice of when to object or not is inherently a matter of trial tactics not ordinarily reviewable on appeal; failure to object does not necessarily indicate incompetence. . . ." ' " (*People v. Frierson* (1979) 25 Cal.3d 142, 158.) We will not presume error in the absence of a record showing that trial counsel's failure to object was the result of incompetence. (*People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-268.)

Moreover, defendant fails to demonstrate a reasonable probability that, but for her trial counsel's failure to object to the alleged *Doyle* error, a result more favorable to defendant would have been reached. As we have explained, the corroborated evidence presented a strong case against defendant. In view of the compelling evidence against her, we conclude there was no reasonable probability of a more favorable result if defendant's trial counsel had objected to the alleged *Doyle* violation.

D

In addition, defendant asserts that her trial counsel rendered ineffective assistance by failing to object to the prosecutor's misconduct in closing argument.

During his rebuttal closing argument, the prosecutor said: "At the end of the day, you have to go home knowing you did the right thing, that the streets of Sacramento are safer because of what you did in this trial. You have to go home knowing that when you're out Christmas shopping, when you step into retail establishments, when you have Christmas money in your wallet during Christmas and you're shopping, that Sacramento

is safer for people because you held the defendant accountable, because everything was proven beyond a reasonable doubt."

Defendant claims those statements by the prosecutor improperly invoked juror fear and invited the jurors to think of themselves in the situation of the victims.

It is misconduct for a prosecutor to appeal to the sympathy and fears of the jury during the guilt phase of a criminal trial. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1192 (*Vance*); *People v. Redd* (2010) 48 Cal.4th 691, 742; *U.S. v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1149.) " '[P]rosecutors may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.' [Citations.] Similarly, prosecutors may not 'point to a particular crisis in our society and ask the jury to make a statement' with their verdict. [Citations.] Nor can prosecutors comment on 'the potential social ramifications of the jury's reaching a . . . verdict.' [Citation.]" (*United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252, 1256-1257 (*Sanchez*).)

Defendant relies on *Vance, supra,* 188 Cal.App.4th 1182, *Com. of Northern Mariana Islands v. Mendiola* (9th Cir. 1993) 976 F.2d 475, overruled on other grounds in *George v. Camacho* (9th Cir. 1997) 119 F.3d 1393, at page 1394 (*Mendiola*) and *Sanchez, supra,* 659 F.3d 1252, to establish that the prosecutor's comments were improper. But even if the challenged statements were improper, reversal would not be required unless defendant could further demonstrate a reasonable probability that a result more favorable to her would have occurred absent the misconduct or with a curative admonition. (*People v. Arias* (1996) 13 Cal.4th 92, 161.) Here, even if defendant's trial counsel had objected to the prosecutor's statements, it was not reasonably probable that a result more favorable to defendant would have been obtained. The prosecutor's comment was brief and was not repeated. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [no reasonable probability of a result more favorable to defendant where prosecutor's

comment was isolated and not repeated].) And as we have explained, there was compelling evidence that defendant committed the Blockbuster Video store robbery. The evidence against defendant makes this case distinguishable from *Vance, supra,* 188 Cal.App.4th at page 1206, *Mendiola*, *supra*, 976 F.2d at page 478, and *Sanchez, supra,* 659 F.3d at pages 1260-1261, where the evidence against the defendants was not particularly strong. Additionally, here the trial court instructed the jury not to let bias, sympathy, prejudice or public opinion influence its decision, to impartially compare and consider all of the evidence presented, to convict defendant only if the evidence proved that she is guilty beyond a reasonable doubt, and that statements by counsel are not evidence. We presume the jury followed the trial court's instructions. (*People v. Martinez* (2010) 47 Cal.4th 911, 957.) Under these circumstances, it is unlikely that the challenged statements by the prosecutor affected the jury's consideration of the case.

II

Defendant contends the trial court erred in instructing the jury based on CALCRIM No. 359. The trial court instructed: "The defendant may not be convicted of any crime based on her out-of-court statements alone. You may rely only on the defendant's out-of-court statements to convict her if you conclude that other evidence shows that the charged crime or lesser included offense was committed. [¶] The other evidence maybe [*sic*] slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime maybe [*sic*] proved by the defendant's statements alone. [¶] You may not convict the defendant unless the People have proved her guilty beyond a reasonable doubt."

In closing argument after the jury instructions were given, the prosecutor referenced, among other things, the trial evidence of recorded phone calls between defendant and her sister Ebony while defendant was in jail. The prosecutor argued that in one of the phone calls, defendant was trying to set up an alibi, and such conduct established that she lied to the jury under oath.

Defendant now argues that the trial court's instruction based on CALCRIM No. 359 violated due process by relieving the prosecutor of its burden of proving guilt beyond a reasonable doubt. She claims the instruction confused the jury because identity was the only issue, but the instruction said that the evidence could be "slight" and that only a reasonable inference was required. According to defendant, the jury could have interpreted the instruction to mean that even if defendant's extrajudicial statements only slightly pointed to her as the robber, they would be enough to convict her.

Defendant did not object to the instruction in the trial court. Nonetheless, we will address her contention because she claims her substantial rights were affected. (§ 1259.)

In assessing a claim of instructional error, "we consider the instructions as a whole, in light of one another, and do not single out a word or phrase, and ' "assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." ' [Citation.]" (*People v. Holmes* (2007) 153 Cal.App.4th 539, 545-546.) We ask whether there is a reasonable likelihood the jury misconstrued or misapplied the law in light of the instructions given, the entire record of the trial and the arguments of counsel. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.)

We conclude there was no instructional error. The trial court instructed the jury, based on CALCRIM No. 359 and in other instructions, that in order to convict defendant, the jury must find that the prosecution proved beyond a reasonable doubt that defendant committed the charged crimes.

Defendant claims the CALCRIM No. 359 instruction was improper because her jailhouse statements to her sister were not confessions. But CALCRIM No. 359 explains the corpus delicti rule, which is not limited to confessions, but also applies to a defendant's extrajudicial statements or admissions. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1169.)

The corpus delicti rule requires that "every element of the 'body of the crime' necessary to show the commission of a crime by somebody, i.e. 'the fact of injury, loss,

or harm, and the existence of a criminal agency as its cause' " be proved independently of the defendant's extrajudicial statements. (*People v. Miranda* (2008) 161 Cal.App.4th 98, 107, italics omitted; *People v. Jennings* (1991) 53 Cal.3d 334, 364.) The purpose of the rule is to ensure that the defendant is not admitting a crime that never occurred. (*People v. Ochoa, supra,* 19 Cal.4th at p. 405.) Proof of the corpus delicti of the offense, which must be independent of the defendant's extrajudicial statements, need not be beyond a reasonable doubt. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1171; 1 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) Elements, § 53, p. 336.) A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1171; *People v. Jennings, supra,* 53 Cal.3d at p. 364; *People v. Miranda, supra,* 161 Cal.App.4th at p. 108, fn. 9.)

The identity of the perpetrator is not part of the corpus delicti. (*People v. Miranda, supra,* 161 Cal.App.4th at pp. 101, 107; 1 Witkin & Epstein, *supra,* § 51 at p. 333.) "[O]nce the necessary quantum of independent evidence [to prove the corpus delicti] is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues" including the identity of the perpetrator. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1171.)

The trial court instruction tracked CALCRIM No. 359 and correctly set forth the corpus delicti rule as explained in *People v. Alvarez, supra,* 27 Cal.4th 1161 and *People v. Jennings, supra,* 53 Cal.3d 334. (*People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498 [substantially similar CALCRIM No. 359 instruction accurately explained corpus delicti rule].) Contrary to defendant's assertions, the instruction did not put improper weight on defendant's jailhouse statements. The challenged instruction expressly stated that the jury may not convict defendant based solely on her extrajudicial statements.

The California Supreme Court rejected the same argument regarding a similar instruction in CALJIC No. 2.72. (*People v. Foster* (2010) 50 Cal.4th 1301, 1344-1346 (*Foster*); *People v. Frye* (1998) 18 Cal.4th 894, 960 (*Frye*), disapproved on other grounds

in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The Supreme Court held that the instruction did not relieve the prosecution from proving beyond a reasonable doubt that the defendant committed the charged crimes. But unlike the corpus delicti instruction in *Foster*, *supra*, 50 Cal.4th at page 1344, footnote 19 and *Frye*, *supra*, 18 Cal.4th at page 959, the challenged instruction in this case expressly told the jury that it may not convict defendant unless the prosecution proved her guilty beyond a reasonable doubt.

Moreover, the trial court repeatedly instructed the jury regarding the prosecution's burden of proof in other instructions, including CALCRIM Nos. 220 and 315. The prosecutor and defense counsel further reinforced the prosecutor's burden of proof beyond a reasonable doubt. Based on the jury instructions as a whole and the statements by counsel in closing arguments, no reasonable juror would have understood that the prosecution had a lesser burden.

Defendant suggests that jury deliberations were "unusually short" because the jury put "misplaced reliance" on defendant's extrajudicial statements as a "shortcut" to a verdict. But this is speculation. Defendant points out that the jury requested audio-visual equipment and reached a verdict about one hour later. However, the trial evidence included Blockbuster Video store surveillance video clips and four audio-recordings, including the 911 calls by Singh and Alvarado and defendant's jailhouse phone calls. The record does not indicate which of these audio-visual items the jury may have reviewed during deliberations. The jury could have listened to the recording of Singh's 911 call, which was compelling evidence against defendant.

We reject defendant's instructional error claim.

III

Defendant contends the foregoing asserted cumulative errors resulted in prejudice. But because we have rejected defendant's claims of prejudicial error, her claim of cumulative prejudice lacks merit.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.